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No. 85-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

MASSACHUSETTS DEPARTMENT OF EDUCATION
AND DARTMOUTH SCHOOL COMMITTEE,

Petitioners,

v.

DAVID D.,

Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

		Page
1.	Opinion of the United States Court of Appeals for the First Circuit, October 15, 1985	1
2.	Opinion of the United States District Court for the District of Massachusetts, September 11, 1984	63
3.	Decision of the Bureau of Special Education Appeals	104
4.	Judgment of the United States Court of Appeals for the First Circuit, October 15, 1985	153
5.	Order Denying Petition for Rehearing and Suggestion for Rehearing In Banc, December 3, 1985	155
6.	Text of Statutes Involved	158

DAVID D., etc., Plaintiff, Appellee

v.

DARTMOUTH SCHOOL COMMITTEE,
Defendant, Appellee

Massachusetts Department of
Education, Defendant,
Appellant.

DAVID D., etc., Plaintiff, Appellee,

v.

DARTMOUTH SCHOOL COMMITTEE,
Defendant, Appellant.

DAVID D., etc., Plaintiff, Appellant

v.

DARTMOUTH SCHOOL COMMITTEE,
et al., Defendants, Appellees.

Nos. 84-1937 to 84-1939

United States Court of Appeals,
First Circuit.

Oct. 15, 1985

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Robert K. Crabtree and Kotin, Crabtree & Strong, Boston, Mass., on brief for the Federation for Children with Special Needs, Inc., amicus curiae.

Before BOWNES, RUBIN[1]/ and TORRUELLA, Circuit Judges.

BOWNES, Circuit Judge.

In this case arising under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1420 (EHA or Act), all parties present questions regarding the district court's interpretation and application of our decision in Town of Burlington v. Department of Education of Massachusetts, 736 F.2d 773 (1st Cir. 1984) (hereafter Burlington II), aff'd sub nom. Burlington School Committee v.

1/ Of the Fifth Circuit, sitting by designation.

Department of Education, __ U.S. __, 105-S. Ct. 1996 (1985). In its decision, the district court followed our direction in Burlington II and considered whether the state special education act mandated a higher level of benefits for disabled children than did the federal "floor" required by the federal Act. Finding that it did, the court used that standard to assess the Town's proposed Individualized Education Program (IEP) for David D., an adolescent with Down's Syndrome. The district court then ruled that the substantially separate program the Town had proposed was deficient under the state standard, and that the child should be educated at a residential private school where there would be consistent behavior training in addition to schooling in academic skills.

The defendants-appellants, Department of Education of the Commonwealth of Massachusetts (State) and the Dartmouth School Committee (Town), claim that the eleventh amendment to the United States Constitution, as interpreted by Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79-L. Ed. 2d 67 (1984) (Pennhurst II), prohibits the "federal courts from interpreting, applying, and enforcing the substantive requirements of state special education law against a State" in an action brought under the EHA. The State has now changed its position from that maintained in Burlington II, where it argued that the district court (the same district judge, we note, as in the case at bar) failed to give the weight to the

state regulations and the state administrative decision that the federal Act requires. Consonant with this approach, we determined in Burlington II that the federal Act "incorporates by reference," 736 F.2d at 789, relevant state law and enforces that law as part of the federal right to a "free appropriate public education." 20 U.S.C. §§ 1401(18), 1412(1). Second, appellants claim that even if we reaffirm Burlington II with regard to the incorporation of state law, the district court's choice and application of "maximum possible development" as the applicable state substantive standard was reversible error.

Plaintiff David D. cross-appeals on two issues. He first alleges that the district court erred in declining to

reach the question whether some of the Town's procedures in handling his individualized educational program and the administrative appeals process were out of compliance with the federal and state regulations. Second, plaintiff contends that the district court should have ordered the Town to provide an appropriate interim program when the educational program requested by plaintiff and initially ordered by the court was unavailable.

We begin with a brief overview of the statute at issue followed by a review of the facts as determined by the district court. We next review the controlling precedent in this circuit before turning to consider the issues presented by this appeal.

I. STATUTORY OVERVIEW

We have reviewed the structure and operation of the statutory scheme at issue here numerous times previously. See e.g., Burlington II, 736 F.2d 773; Doe v. Brookline School Committee, 722-F.2d 910 (1st Cir. 1983); Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983); Ezratty v. Commonwealth of Puerto Rico, 468 F.2d 770 (1st Cir. 1981); see generally Board of Education of Hendrick Hudson v. Rowley, 458 U.S.-176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Education for All Handicapped Children Act is designed to assist states and local agencies in their efforts to educate physically and mentally disabled children. Federal funds are provided to contracting states which

promise to provide at a minimum a "free appropriate public education" for all handicapped children within the state, 20 U.S.C. § 1412(1), and which agree to set up a complaint and appeal process for the children and their parents as the federal Act mandates.

The key operative feature of the federal Act is the "individualized education program" (IEP). 20 U.S.C. §§ 1401(19); 1414(a)(5). The IEP process is the means through which the statutory mandate is "tailored to the unique needs of the handicapped child." Rowley, 458 U.S. at 181, 102 S. Ct. at 3038. The IEP itself is formulated at a meeting of the parents, teachers, administrators and, where appropriate, the child. It must specify the instructional goals and objectives, any special services to be provided, and criteria

for progress evaluation. See § 1401(19). The Act further requires at least an annual review of each child's IEP and authorizes revisions where appropriate. § 1414(a)(5); see also § 1413(a)(11).

If the parents or the child believe that the IEP the school system decides to implement provides a lesser education than they regard to be their legal right, or if they feel their procedural rights have been infringed, they have a right to an impartial due process hearing conducted by the state educational agency. § 1415(b)(2). Should any party be "aggrieved by the findings and decision" of the state administrative hearing, § 1415(e)(2) of the Act grants a right to bring a civil action in federal or state court.

II. FACTUAL BACKGROUND

Our standard of review is that unless clearly erroneous, the facts as found by the district court are controlling. Here, with one exception, the facts are generally not disputed. The only factual matter truly at issue is whether David's special needs are severe enough to warrant a full-time, residential program or whether, instead, David is being education to the degree legally imposed as a minimum standard by attendance at a special education day program with some supplementary services in the local school district.

David is a seventeen year old adolescent with Down's Syndrome, who learns and has skills at the kindergarten level. Although he has been gaining academic skills during the time he has been a

a student at the Dartmouth school, he has in recent years exhibited a range of seriously inappropriate behavior showing little or no self-control in unstructured or unfamiliar situations. David's parents are concerned that some of the behavior he has been exhibiting will result in his being unable to become a productive adult with a job in a sheltered workshop and denial of his access to and living within the mainstream community. Such has been predicted by special education professionals as the likely outcome, given the range, gravity and frequency of his inappropriate behavior. The parents maintain that the Dartmouth School Committee (Town) has not taught and will not be able to teach David self-control, rendering the IEP the Town

proposed for him fatally deficient. The district court agreed with the parents and reversed the decision of the state educational agency. The court expressed the additional concern that David will come into conflict with the law if he persists in a lack of self-control.

The evidence presented at both the administrative hearing and at trial showed that David has repeatedly and unrelentingly engaged in sexual and aggressive behavior directed at persons and animals. He has repeatedly grabbed at students' genitals, lain on the floor of his classroom attempting to look up female students' dresses, tried to touch female staff and students' breasts, and tried to embrace complete strangers. He has repeatedly attempted to engage in sexual play with neighborhood dogs. He

has entered neighbors' homes uninvited and has refused to leave. In every evaluative setting, David was observed engaging in seriously inappropriate behavior of a sexual and aggressive nature.

The district court carefully reviewed the testimony of special educational professionals who had had experience with David. Except for his classroom teacher, each recounted and characterized David's behavior as extreme even when compared with that of students with similar cognitive functioning. For example, when David was evaluated at the Doctor Franklin Perkins School, his behavior substantially deteriorated over the day. He refused to follow directions, ran uncontrollably up and down a fire

escape and into offices, and leaped repeatedly over a safe in the residential area. He exhibited sexually provocative behavior, such as kissing a secretary and touching another staff member's buttocks. Similar behavior occurred at each of the other evaluative settings. In one instance, the balance of the evaluation was cancelled because his behavior was too extreme for admission to that program for the severely to moderately retarded. Because of similar behavior, David had previously been sent home from a camp for the developmentally disabled.

All parties to the case agreed that social and personal skills including sex education are part of David's special education needs and that his educational program should effectively address these

objectives. The conclusion of all four of the independent evaluators was the same: that David needed a comprehensive, 24-hour, highly structured special education program that would address his social and behaviorial needs in a consistent way by a trained staff throughout his waking hours. These experts, whom the district court credited, uniformly believed that given the frequency and intensity of his unacceptable actions, the Dartmouth IEP would not be sufficient to address David's need for continuous training. They were of the opinion that learning the self-control essential to living in the mainstream community would take from one to two years, and after that, David could and should be returned to the community.

III. THE ELEVENTH AMENDMENT QUESTION

In Burlington II we were faced with the question whether the district court was enabled under the EHA to interpret and enforce state law as part of ensuring a "free appropriate public education" for the disabled child. The State had contended that it was error for the district court to ascertain and effectuate only the federal statutory and regulatory mandates when, under both the federal and state Acts, the state law and implementing regulations also bound local educational agencies (LEAs) in regard to the education of special needs children. Burlington II at 787-88 (citing 20 U.S.C. §§ 1412(6); 1414(a) (5)-(7); 34 C.F.R. §§ 300.180-300.240; 300.452; 300.530-.534

Mass. Admin. Code tit. 603, §§ 200.0-211.0; 300.0-328.4); see also Burlington II at 784-85.

After carefully reviewing the statutory scheme as a whole with the goal of "interpret[ing] its various provisions harmoniously in order to achieve the congressional aims underlying the Act," Doe v. Brookline School Committee, 722 F.2d at 915; see also Philbrook v. Glodgett, 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed. 2d 525 (1975), we noted that Rowley held that Congress had intended the federal Act to create a "basic floor" of educational opportunity for disabled children, Burlington II, 736 F.2d at 788 (citing Board of Education of Hendrick Hudson v. Rowley 458 U.S. at 201, 102 S. Ct. at 3048 (1982)). We found "no indication in either the statutory language or the legislative history of the Act

that Congress intended to create a substantive or procedural ceiling regarding the rights of the disabled child." 736 F.2d at 784. Our review of the Act convinced us that Congress had incorporated by reference relevant state substantive and procedural law with the understanding that that law would form and be enforced as part of the federal right to a free appropriate public education. Id. at 789.

The State now claims that we went too far, that federal courts cannot enforce pertinent state substantive law against the state as a matter of federal law owing to the restrictions of the eleventh amendment, and urges that we should limit the Burlington II construction to cases where the State specifically requests a federal court to enforce

its law. We construe this position as being that only if a state waives its eleventh amendment immunity can a federal court enforce the state substantive law.

Despite the State's inconsistent and perhaps even contradictory positions in Burlington II and this case, we have reviewed our prior holding. We remain convinced that Burlington II correctly held the federal Act to incorporate by reference some of a state's substantive law. We feel constrained, however, to explain our prior holding in more detail although we will not repeat points adequately covered in Burlington II; that opinion should be consulted for the balance of our analysis. We conclude that the holding withstands the State's eleventh amendment challenge even under the more

rigorous rules of Atascadero State Hospital v. Scanlon, __ U.S. __, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985), where the Court required that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakeable language in the statute itself." Id. at ___, 105 S. Ct. at 3148.

A

We first review the question whether the federal Act incorporates state law. In any issue of statutory construction, the first step is an analysis of the statutory language. North Haven Board of Education v. Bell, 456 U.S. 512, 520, 102 S. Ct. 1912, 1917, 72 L. Ed. 2d 299 (1982); Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). The core right guaranteed by the federal Act, a "free appropriate

public education" is defined at the beginning of the Act:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1415(a)(5) of this title.

20 U.S.C. § 1401(18) (emphasis added). Congress explained what it meant by an "appropriate"[2/] education for a handicapped child beyond the federal "floor"

2/ Each of the four subsections of the provision amplifies what Congress meant by a "free" and "public" education; (B) sets forth a requirement for what is "appropriate"; (C) bears on determining what is both "appropriate" and "public"; and (D) which requires by reference periodic review and revision of the educa-

(footnote continued)

of benefits, Rowley, 458 U.S. at 201, 102 S. Ct. at 3048, Burlington II at 788, by two specific requirements imposed on all contracting states. The states promised to educate disabled children in accordance with "the standards of the State educational agency," 20 U.S.C. § 1401(18)(B); see also § 1412(6), and to review and revise periodically a disabled child's educational program, § 1401(D). The Court's discussion in Rowley underscores the importance of each of these requirements:

> Almost as a checklist of adequacy under the Act, the definition also requires that such

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(footnote continued)

tional program, explicates another aspect of what Congress signified by an "appropriate" education. See Rowley, 458 U.S. at 188-89, 102 S. Ct. at 3041-42.

> instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Rowley, 458 U.S. at 188-89, 102 S. Ct. at 3042 (emphasis added). It would seem beyond cavil that the federal standard explicitly incorporates some of a state's substantive law[3/] into the federal Act.

3/ The State contends that "standards of the State educational agency" does not import the requirements of state law. We think, however, that Congress understood that the state educational agencies' standards are not sui generis or lawless, but must conform to the mandate of state statutes as interpreted by state courts.

Accord Students of California School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), vacated as moot, __ U.S. __, 105 S. Ct. 1820, 85 L. Ed. 2d 114 (1985).[4/]

The federal Act mandates that each contracting state enact "policies and procedures" consistent with the federal Act to guarantee that a "free appropriate public education" is provided to each handicapped child in the state. §§ 1412(2); 1413(a)(1)-(11). Some of the substantive regulations that Massa-

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4/ The State does not challenge Burlington II's holding that the part of a state's special education law regarding procedural rights of the disabled child is enforceable by the federal courts. This ruling was based on the Act's explicit authorization for states to adopt greater protections for the disabled child than the federal Act requires. §§ 1415(a); 1415(b)(1); see also Burlington II at 785.

chusetts has promulgated to this end include a requirement that facilities in which handicapped youths are taught must be "equal in physical aspects," Mass. Admin. Code tit. 603, § 508; that no sign may be posted stating that the classroom is for handicapped or special education, id. at § 508.2(b); that barriers to physical access must be removed, id. at § 508.3(b); and that transportation to school must be provided to the child, id. at § 905. Should an LEA fail to comply with these regulations, the parents and the disabled child have the right to file a complaint. § 1415(b)(1)(E). The complaints authorized by the federal Act may be brought "with respect to any matter related to the identification, evalu-

ation, or educational placement of the child, or the provision of a free appropriate public education to such child." Id.; see also § 1415(b)(2). Because the statutory definition of a free appropriate public education, as already noted, explicitly provides that a covered child's education will "meet the standards of the State educational agency," a complaint may be brought and pursued up the reviewing ladder to a state or federal court per § 1415(e)(2) on the issue of substantive conformity of a child's educational plan with the State's educational standards.

This construction of the statutory mandate accords with the legislative history of the Act. In explaining the conference bill to the Senate, the principal

author of the Act stated:

> Seventh. The provisions of existing law are clarified and strengthened with respect to impartial due process hearings and language is adopted to assure that:
>
> Any parent or guardian may present a complaint concerning any matter regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to "free appropriate public education" has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State educational agency, or any other question within the scope of the definition of "free appropriate public education." In addition, it

> should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child . . . .

121 Cong. Rec. 37415 (Nov. 19, 1975) (Sen. Williams) (emphasis added). Senator Williams emphasized that whether the substantive standards of the state agency have been met by "the services provided a child" is a question for the due process hearing procedures. Thus, our holding that the federal right to a free appropriate public education incorporates substantive rights authorized by state special education law which become part of the federal core right is bottomed on both the statutory language and authori-

tative legislative history.[5/]

5/ The State argues that the Act's requirement that a free appropriate public education must "meet the standards of the State educational agency" is solely to assure a single line of administrative authority for special education within a state. While Congress structured the Act to achieve this administrative goal, the State's argument fails to explain why Congress considered the requirement, were it to signify nothing more, so crucial that it became one of the four explicit criteria for determining whether a free appropriate education was being provided to a child. Further, the State's construction cannot explain, and would flatly contradict, the crystal-clear explanation of the bill's chief author quoted above. The legislative history the State cites as demonstrative of congressional support for its interpretation of the provision as a mere administrative requirement goes not to § 1401(18) but to the responsibilities of the State educational agency if it wishes to maintain eligibility for federal funds under the Act. See § 1412(6); Sen. R. No. 94-168, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1448; compare id. at 1448 with id. at 1434.

Our conclusion is reinforced by the practical and legal implications of the State's theory about the way the due process hearing system was intended to operate. Its view is that state substantive standards can be interpreted and enforced by state officials only, i.e., state hearing officers and judges, but not the federal courts; that state substantive law was not intended to be incorporated into the federal Act. Such a construction would mean that from the very beginning of the adminstrative complaint process, the governing body of law and the applicable legal standards would be in doubt. If the case were appealed to the state hearing officer and to the state courts, state law, both substantive and procedural, in conjunction with the federal Act would form the applicable body of law. If, however, the case were ap-

pealed to a federal court, the "skeletal federal provisions designed as minimum standards," Burlington II at 785, would be the only source of substantive law. Under the integrated review system the federal Act sets up, the state administrative structure is responsible for the due process hearings until there is an appeal to court.6/ This means that, under the State's approach, the case could have different or more exacting standards applied to it throughout the federally-mandated but state-run administrative review process than from the court, should an appeal be heard by a federal court.

6/ Under 20 U.S.C. § 1415(e)(2), a party aggrieved by the state administrative decision may bring a civil action in either state or federal court.

We do not think Congress envisioned having handicapped childrens' plans subject to double legal standards dependent solely upon the aggrieved party's choice of forum. Neither do we discern any intention that the federal Act preempt and reduce all state standards to the federal minimum. Burlington II at 784-85. This would conflict with the cooperative federalism courts have found to be the structural principle undergirding the Act. See id. at 783-84 (collecting cases). Rather, we think Congress contemplated, and due process requires, that a consistent body of law would be applied throughout all stages of the due process hearing system. Congress intertwined federal and state standards into one body of law, and did not leave EHA cases dependent upon whether an appeal is

taken to a state or federal court.[7/]

The next question is whether a state's overall substantive standard for determining the sufficiency of a handicapped child's IEP is to be treated differently from other substantive requirements mandated by the state. The Con-

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7/ Federal incorporation or adoption of state law is not unusual. See Burlington II at 785 n. 9; see also Herb's Welding Inc. v. Gray, ___ U.S. ___, ___, 105 S. Ct. 1421, 1425, 84 L. Ed. 2d 406 (1985) (citing Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969)); United States v. Yazell, 382 U.S. 341, 356-57, 86 S. Ct. 500, 509, 15 L. Ed. 2d 404 (1966); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); DeSylvia v. Ballentine, 351 U.S. 570, 580, 76 S. Ct. 974, 979, 100 L. Ed. 2d 1415 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law).

gress explicitly defined a free appropriate public education as an education which "meets the standards of the State educational agency" and expressly authorized review of the question whether the education actually provided (or proposed) met those standards. Where a state has chosen to provide by law greater benefits to handicapped children than the federal Act requires, we believe Congress explicitly mandated that the courts--both federal and state--determine whether those state standards have been met. We need not decide at this time the extent of what constitutes "relevant" state substantive law; we hold only that a state's overall standard for evaluating the IEPs of handicapped children is incorporated by the federal Act.

The State argues that even if state law is incorporated into the federal Act, the decision of the state hearing officer on questions of state law should be considered the authoritative ruling on those questions where an appeal is taken to federal court, and should not be subject to displacement by a federal tribunal. This argument falters on several important countervailing considerations. First, the federal Act authorizes judicial review of EHA cases by state and federal courts on coequal terms. Second, the subject matter that can be appealed includes "any matter" relating to a disabled child's education or related rights. Finally, and most importantly, the state's construction would insulate from judicial review any rulings on state law should the aggrieved party file suit

in federal court. Such a construction would therefore elevate the administrative hearing officers' decisions to those of the highest state court. Under our federal system, the federal courts should give due deference to authoritative decisions on state law rendered by a state's highest court, O'Brien v. Skinner, 414 U.S. 524, 531, 94 S. Ct. 740, 743, 38 L. Ed. 2d 702 (1974), but the hearing officer is not enabled to render such a decision. The practical and legal effect of the State's construction would result in a federal court granting more than the deference to state agencies' construction of state law recognized as due. Burlington II at 792; see also Rowley, 458 U.S. at 206, 102 S. Ct. at 3050. We have found no statutory basis for such an

interpretation of the Act. Thus we reaffirm our Burlington II holding that the federal Act incorporates relevant state substantive law and enforces that law as part of the federal right to a free appropriate public education. 736 F.2d at 789.

B

Having settled the question of what sources provide the law Congress intended to be applicable to complaints filed by handicapped children, we now turn to the question of the eleventh amendment's strictures on congressional action. The issue is whether Congress has effectively overridden the states' sovereign immunity the Supreme Court has held the Amendment to embody. Two separate, but related questions must be addressed: first, have the requirements the eleventh amendment

imposes upon Congress when it seeks to render the States subject to suit in federal court been satisfied?; and second, given that Congress has "borrowed" state law to constitute a portion of the federal Act, are there any Pennhurst II obstacles to a federal court's enforcement of that law over a state's objections?

To answer the first question, we turn to the recent opinion of Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142, 87 L. Ed. 2d 171. There, the Court determined that § 504 of the Rehabilitation Act (RHA) did not effectively abrogate the states' eleventh amendment immunity from suit in federal court where litigants seek retroactive monetary relief. Id. at ___, ___, 105 S. Ct. at 3144, 3150. Three arguments were made

and rejected: (a) that the state had waived its immunity on the basis of state law; (b) that Congress had, by enacting the RHA, abrogated the states' constitutional immunity; and (c), that by accepting federal funds under the RHA, the state had consented to suit in federal court. We are not concerned here with arguments (a) or (c); we need determine only whether Congress effectively overrode the states' sovereign immunity in acting the EHA. The applicable principle is clear:

> [T]he Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," that is, by Congress' power "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 [96 S. Ct. 2666, 2667, 49 L. Ed. 2d 614] (1976).

Atascadero, at ___, 105 S. Ct. at 3145. Whether Congress did so here is the question before us.8/

We think Congress effectively subjected the states to suit in federal court under the EHA. Accord Parks v. Pavkovic, 753 F.2d 1397, 1407 (7th Cir. 1985); Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). The basic requirement

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8/ Defendants contend that the EHA is a product of Congress' Spending Clause powers. Indeed, it partially flows from such power, see Rowley, 458 U.S. at 190 n. 11, 204 n. 26, 102 S. Ct. at 3042, n. 11, 3049 n. 26; Ezratty v. Commonwealth of Puerto Rico, 468 F.2d 770, 777 (1st Cir. 1981). But as the Court clarified in Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 3468, 82 L. Ed. 2d 746 (1984), see infra, the EHA is also an exercise of fourteenth amendment powers designed to effectuate the Equal Protection Clause. Accord Crawford v. Pittman, 708 F.2d 1028, 1036 (5th Cir. 1983). In any event, the Court did not in Atascadero differentiate between the standards applicable under the two clauses.

requirement of Atascadero is that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakeable language in the statute itself." Id. at ___, 105 S. Ct. at 3148 (footnote omitted). Unlike the RHA, which was the statute at issue in Atascadero, Congress stated in the preamble of the EHA:

> [I]t is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

Pub. L. 94-142, § 3(b)(9) codified at 20 U.S.C. § 1400(b)(9) (emphasis added); see Smith v. Robinson, __ U.S. __, 104 S. Ct. 3457, 3486, 82 L. Ed. 2d 746 (1984). Although the RHA incorporates, and by implication, seeks to promote equal protec-

tion values, nowhere in the statute itself did Congress expressly declare that it was acting to assure equal protection of the law; it was for this reason that the RHA "fell far short" of the mark needed to abrogate states' sovereign immunity.

In addition to this "unmistakeable" statutory language, and again in contrast to the RHA, the Supreme Court has already extensively discussed the EHA's grounding on the Equal Protection Clause. In Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 82 L. Ed. 2d 746, the Supreme Court affirmed this court's holding that the EHA was the exclusive scheme for vindicating handicapped children's rights to "a free appropriate public education as guaranteed by the Equal Protection

Clause . . . ." Id. at 3468. Consequently, the Court held that no 42 U.S.C. § 1983 action to vindicate those rights would lie. The Court went so far as to characterize the plaintiffs' constitutional (fourteenth amendment) claims, which were based on denial of due process and denial of equal protection as "virtually identical to their EHA claims." Id. Finally, the Court held in Smith:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accomodate the needs of each handicapped child, we find it difficult to believe that Congress meant to leave undisturbed the ability of a handicapped child to go directly into court with an equal protection claim to a free appropriate public education.

Id. at 3469. As support for this determination, the Court pointed to the unambiguous statutory language of § 1400(b)(9) and noted that the impetus behind the EHA was two federal cases establishing that a state's failure to provide to handicapped children a free public education appropriate to their needs was a constitutional violation. See Smith v. Robinson, 104 S. Ct. at 3468; Rowley, 458 U.S. at 180 n. 2, 192-200, 102 S. Ct. at 3037 n. 2, 3043-3047, and H.R. Rep. No. 94-332 at 3-4, all referring to Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.C. 1972), and Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. 1972).

In addition to the explicit comments within the statute itself and the Supreme Court's ruling that Congress considered itself to be acting under its fourteenth amendment powers to promote the equal protection of the law, there is other evidence of congressional intent to subject states to federal court jurisdiction. Unlike the remedies for violation of § 504 of the RHA, which are broadly directed to "any recipient of Federal assistance," and include a broad range of institutions and organizations, the EHA is directed to one class of actors: states and their political subdivisions responsible for providing public education. See, e.g., 20 U.S.C. §§ 1412, 1413; 34 C.F.R. § 300.2. This accords with the most basic of political knowledge that free public education is pro-

vided by and under the aegis of the states.

Under the federal Act and its implementing regulations, the State educational agency promises to ensure that it and its local educational agencies will provide at minimum a free appropriate public education. Part of these guaranteed rights is the due process complaint and hearing system which is to take cognizance of "any matter relating to" a disabled child's education or procedural rights. The culmination of the state administrative appeals process is the right of any party "aggrieved" by the decision or procedure employed to take the matter to either state or federal court. § 1415(e)(2). Obviously, since the state is responsible for guaranteeing that a child will receive both the

substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding. The legislative history reinforces this view. See supra at 13 (primary author of bill stated: "In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child . . . ").

Having concluded that Congress acted pursuant to its fourteenth amendment powers, and effectively abrogated the sovereign immunity of the states from suit

in federal court, we turn to consider whether the state is amenable to suit in federal court based on alleged violation of state standards which are incorporated into the federal Act. The State relies on Pennhurst II for its position that the eleventh amendment proscribes federal courts from interpreting and enforcing state substantive standards that have been incorporated into the federal Act.

In Pennhurst II, however, the federal courts sought to provide relief on the basis of pendent state law claims. See 104 S. Ct. at 905, 910. In the EHA context, as we noted previously, no pendent state claim will lie. See Burlington II at 788. Relief in federal courts must be sought and awarded only on the basis of the EHA, which includes, as we have determined, state substantive stan-

dards which are consistent with, but more exacting, than the provisions of the federal Act. This approach has been confirmed by the Supreme Court in Smith v. Robinson:

> The District Court purported to award relief on the basis of state law. In light of the decision in Pennhurst [II], that was improper. The propriety of the injunctive relief, however, is not at issue here. We think that the Court of Appeals [for the First Circuit] was correct in treating the relief as essentially awarded under the EHA, since petitioners had challenged the State Commissioner's construction of state law on the basis of their rights under the EHA . . . . It is clear that the EHA creates a right, enforceable in federal court, to the free appropriate public education required by the statute. Board of Education v. Rowley, 458 U.S. 176 [102 S. Ct. 3034, 73 L. Ed. 2d 690] 20 U.S.C. § 1415(e)(2).

104 S. Ct. at 3464 n. 6 (emphasis added). Thus, under the EHA, which employs the unusual system whereby the state-federal review apparatus, procedure, and standards are intertwined from the initial complaint until the final decision, the intertwined body of law is applicable to EHA cases regardless of the court chosen for the appeals process. Pennhurst II speaks not to this situation but proscribes federal courts from requiring states to conform their conduct to state law qua state law.

C

We now turn to the district court's decision, which we have no difficulty affirming in its entirety. The overwhelming evidence showed that a change in David's IEP was warranted. The District Judge carefully reviewed the ad-

ministrative findings, received additional evidence, and discussed David's needs as a unique individual, rather than as an abstract representative of the category of children with Down's syndrome. She found that while David was making progress in some of the academic areas within the Dartmouth School Committee's classroom, his inappropriate sexual behavior continued unabated and posed a serious threat to David's ability to live in the community. The importance of "maximizing [David's] potential for eventual placement in a community-based program or private employment" had already been idenified by the state hearing officer as an appropriate objective of the IEP.

The district judge was especially concerned that, although David had per-

formed relatively well in the rather cloistered and familiar environment of the school he had been attending for several years, in less familiar situations, or where relatively unsupervised, he frequently showed little or no self-control in his conduct towards other persons. The court pointed to a variety of situations where this had occurred, including David's being sent home from a camp for handicapped youths, and his rejection from other programs. The court was especially concerned because some of the special education experts who evaluated David regarded his lack of self-control and related behavior grave enough to warrant rejection of him from developmentally disabled service programs, and predicted that he would not be admitted to sheltered workshops for employment or

community-based programs. As the court concluded, the evidence uniformly shows that the behavior problem in unstructured or unfamiliar situations has become less controlled over the past two years in the Dartmouth Schools rather than improved.

The district court also found that since Massachusetts law mandated a level of substantive benefits superior to that of the federal Act, the state standard would be utilized as determinative of what was an "appropriate" education for the child. The court noted that the Massachusetts Supreme Judicial Court "in a recent decision interpreted [state education law] as requiring the Department of Education to administer special education programs 'to assure the maximum possible development of a child with spe-

cial needs.' Stock v. Massachusetts Hospital School, 392 Mass. 205, 211 [467 N.E.2d 448] (1984)." Since both the federal and state Acts require that education be provided in the least restrictive environment, see 20 U.S.C. § 1412(5); Mass. Admin. Code tit. 603, § 110.0, the district court stated the issue as "whether Dartmouth's IEP addresses plaintiff's special educational needs so as to assure his maximum possible development in the least restrictive environment consistent with that goal." We think that the court both phrased and answered the question correctly.[9/]

9/ We do not construe the federal Act to codify the State's standard and render it immune from state revision. Should the highest state court, the legislature, or other governmental unit empowered to act revise the applicable state law, the federal courts will use the standards as amended.

IV. PLAINTIFF'S CROSS-APPEAL

We need not tarry long over plaintiff's cross-appeal. He presents two issues. He first contends that the district court erred in declining to reach the question whether some of the Town's procedures regarding the writing of his IEP, and the administrative appeals process, were out of compliance with the State and federal regulations. Secondly, plaintiff claims that the district court erred in not ordering the Dartmouth Schools to reproduce within its school system the services that would have been provided to him at the private residential school which was filled and unable to accept him at the time the court decision was issued.

As for procedural errors, we note that plaintiff failed to bring up the

question at the administrative hearing. Because the district court's role in an EHA case is to provide "something short of a trial de novo," Colin K. v. Schmidt, 715 F.2d at 5, and can best be characterized as conducting a review proceeding, we have previously held that for issues to be preserved for judicial review they must first be presented to the administrative hearing officer. Id.; see also Burlington II at 781. Accordingly, this issue is not properly before us.

In regard to plaintiff's second issue, the district court directed that the parties attempt to negotiate a solution to David's scholastic limbo and declined to issue any interim orders until such negotiation was completed. While "delay in resolving matters regarding

the educational program of a handicapped child is extremely detrimental to his development," 121 Cong. Rec. 37416 (Nov. 19, 1975) (remarks of Act's principal author), Burlington II at 800, the Act also prefers that IEPs and by extension, interim services, be a product of good-faith cooperation and negotiation among the parties. Id. at 799. We are troubled that the program the district court ordered for David was unavailable at the time of the decision and order properly appealed here, and that no similar school could be located for him. But our concern does not allow us to transgress the strictures of our appellate jurisdiction. Because the district court has not issued any final order on plaintiff's motion for enforcement and the provision of interim services, we cannot hear the

appeal under 28 U.S.C. § 1291 jurisdiction. Accordingly, plaintiff's cross-appeal is dismissed; the first issue with prejudice, the second without prejudice.

The district court's judgment is affirmed.

TORRUELLA, Circuit Judge (dissenting).

The facts of this case, which are adequately covered in the court's opinion, present an emotive situation. Unfortunately the binding provisions of the Eleventh Amendment prevent me from joining the majority in concluding that David D. has an enforceable cause of action in a federal court against the Commonwealth of Massachusetts. See Pennhurst State School v. Halderman, (Pennhurst II), 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985).

Assuming the validity of circumventing Pennhurst II through the "incorporation by reference" doctrine enunciated in Town of Burlington v. Department of

Education, 736 F.2d 773, 778 (1st Cir. 1984), this proposition is sustainable only if it meets the high standards established by Atascadero for overriding the Eleventh Amendment.[10/] There, as in the present case, reliance was made upon vague legislative history and general statutory language for the proposition that a federal statute, the Rehabilitation Act of 1973 (87 Stat. 384, as amended), had superseded the state's immunity from suit in federal court. The Court in unusually stringent language restated the rule that had been emerging

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10/ Congress may override Eleventh Amendment immunity when acting pursuant to its authority under the Fourteenth Amendment, Section Five. Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56, 96 S. Ct. 2666, 2670-71, 49 L. Ed. 2d 614 (1976).

the rule that had been emerging from Pennhurst II and Quern v. Jordan, 440 U.S. 332, 342, 99 S. Ct. 1139, 1146, 59 L. Ed. 2d 358 (1979):

> Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

___ U.S. ___, 105 S. Ct. at 3148 (emphasis supplied).

Because I believe that the present situation under the Education for the Handicapped Act, 20 U.S.C. § 1401 et seq., is indistinguishable[11/] from that in Atascadero under the Rehabilitation

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11/ See Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 29, 70 L. Ed. 2d 6 (1981).

Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent. See also Miener v. Missouri, 673 F.2d 969, 981 (8th Cir. 1982).

DAVID D.

vs.

DARTMOUTH SCHOOL COMMITTEE, et al.

United States District Court
D. Massachusetts.

September 11, 1984

Richard F. Howard, Developmental Disabilities Law Center, Boston, Mass., for the plaintiff.

Kim E. Murdock, Ass't Atty. Gen., Government Bureau, Boston, Mass., for the defendants.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

David D. is a 17-year old adolescent with Downs Syndrome who lives with his parents in Dartmouth, Massachusetts and has received special education services from the Dartmouth Public Schools. He commenced this seven-count action pursuant to the Education for All Handi-

Handicapped Children Act of 1975, 20 U.S.C. § 1401-20 (EAHCA) following a decision by the defendant Massachusetts Department of Education's Bureau of Special Education Appeals ("BSEA") that the Individual Education Program ("IEP") offered by defendant Dartmouth School Committee ("Dartmouth") for the 1982-83 school year was appropriate for his special education needs, rejecting plaintiff's contention that those needs required a residential setting.[12/]

12/ The first count of his complaint alleges substantive error in the BSEA finding and a consequent violation of the EAHCA. Counts II and III allege violations of the procedural requirements of the EAHCA in that the hearing officer was not impartial; and that plaintiff's parents were not given adequate notice of or assured full participation in the development of the challenged IEP. Count IV alleges that these actions constituted discrimination in violation of the

(footnote continued)

plaintiff seeks judicial review of the BSEA decision and appropriate declaratory and injunctive relief, with costs and attorneys' fees.

20 U.S.C. § 1415(e)(2) directs that in reviewing an administrative decision under the EAHCA "the court shall receive the records of the administrative proceeding, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

(footnote continued)

Rehabilitation Act of 1973, 29 U.S.C. § 794, and Count V that such discrimination also violated plaintiff's right to equal protection under the Fourteenth Amendment to the United States Constitution. Count VII raises the pendent claim of violation of the relevant state statute, Mass. Gen. Laws ch. 71B, and ch. 15, § 1M. Plaintiff voluntarily dismissed Count VI, based on the Massachusetts Constitution.

I. The Administrative Findings

The evidence presented at the BSEA hearing included the testimony of David's mother concerning his sexual and aggressive behavior directed at animals and persons in the community, which had led her to believe the nonresidential Dartmouth program to be inadequate to meet his needs. In addition, Mr. Bowman and Dr. Rogoff, a psychologist and psychiatrist who examined David at the Developmental Evaluation Clinic of Children's Hospital Medical Center opined that elimination of this behavior would require a 24-hour a day training program, and Mr. Asztalos, Program Director at the Learning Center for the Multiply Handicapped, described the resident program the Center offered David. On the

other hand, David's teacher in the Dartmouth special education progam testified to his satisfactory progress and lack of significant behavior problems during the school day, an account corroborated by David's physical education teacher.

The hearing officer, in a careful and thorough opinion, found that plaintiff had shown the ability to control his sexual and aggressive drives within the school setting, and was achieving effective educational progress toward the goals contained in the 1982-83 IEP. She concluded that his breaches of acceptable social behavior outside the structured school situation were isolated, and that he had demonstrated the capacity to generalize his ADL ("activities of daily living") skills at home and

in the community. She noted that plaintiff's educational program should be directed towards maximizing his potential for eventual placement in a community-based program or private employment. Because she felt that plaintiff's sexual preoccupation could be a deterrent to his acceptance in such placements, she found that therapy to assist plaintiff in dealing with his sexual feelings was a necessary supportive service. She accepted Dartmouth's proposed amendment to the IEP providing for individual therapy for plaintiff and family counseling for his parents and sister with a licensed clinical social worker, and found that the IEP as amended was adequate and appropriate to meet plaintiff's special educational needs in the least restric-

tive prototype mandated by the governing statutes. Plaintiff filed this action on July 1, 1983.

II. Evidence Presented at Trial

In addition to the administrative hearing record, the parties offered several witnesses to supplement that record. In accordance with the First Circuit's directive that such evidence must not change the character of the hearing from one of review to a trial de novo, Town of Burlington v. Department of Education, 736 F.2d 773, 790-91 (1st Cir. 1984) ("Burlington II") the additional evidence concerned only the time subsequent to the hearing or was offered by witnesses who did not appear at the hearing and was noncumulative.

Dr. Andrea Spencer is Director of Programs at the Doctor Franklin Perkins School ("FPS") in Lancaster, Massachusetts, which serves moderately and severely retarded children, most with behavioral problems. She initially observed plaintiff at Samoset House, a weekend respite placement, in May 1984, and further observed him when he visited FPS on May 23, 1984. His behavior during evaluations of his academic, pre-vocational and speech skills was adequate, but deteriorated during a tour of the school. He refused to follow directions, ran uncontrollably up and down a fire escape and into offices, and leapt repeatedly over a safe in the residential area. He also exhibited sexually provocative behavior, kissing a secretary and touching another staff member's buttocks. Dr. Spencer testified that his

behavior was extreme even when compared with that of students with similar cognitive functioning. She stated that his refusal to follow directions and his sexual behavior, if continued, would significantly restrict his future options, since placement in a community residence or workshop requires some internal control.

In her opinion the overall goal of any special education program is to assist the student to maximize his ability for independence as an adult. She stated that because plaintiff's behavior problems impede his progress toward that goal, even if they occur only outside the classroom, they constitute needs which a special education program must address. Such an educational program should address plaintiff's social and be-

havioral needs in a consistent way throughout his waking hours. She described the behavior modification technique FPS would use to eliminate plaintiff's unacceptable behavior, by systematically rewarding finite periods of good conduct. In order to be successful, such a program must be carried on every day and throughout the day by trained staff. At FPS plaintiff would receive training in functional academics, speech, art, and music therapy, and adaptive physical education, as well as pre-vocational training designed to enable him to meet the standards of a sheltered workshop, during the six-hour school day; and engage in activities structured by staff from the close of the school day until his bedtime.

Dr. Spencer opined that the Dartmouth IEP was not sufficient to overcome plaintiff's behavioral problems because it did not provide for a consistently administered program training plaintiff to generalize the social skills he learned in the classroom to situations encountered in all his waking hours. She believed that after a one to two year stay at FPS such an IEP might be adequate for plaintiff's needs, but that at this time those needs require residential placement at an institution such as FPS.

Richard Asztalos, a behavioral specialist at the Learning Center for the Multiply Handicapped ("LC") in Belmont, agreed with Dr. Spencer's assessment of plaintiff's need for a residential placement. At the BSEA hearing he had offered

the LC as an appropriate residential program for plaintiff. He testified at the trial that the LC would now not be able to accept plaintiff, since LC's community setting made it impossible adequately to control plaintiff's behavior without devoting an unacceptably high amount of the LC's resources to him. In assessing plaintiff's behavior he relied on his observations of plaintiff during a three-hour evaluative visit to the LC on January 4, 1984. Although plaintiff responded fairly well during his academic evaluation, during later pre-vocational tasks and meetings with other students he refused to respond to directions, hugged several students and grabbed their genitals. While being driven to the residence area of the LC he jumped be-

the front and back seats of the car and similarly hugged and touched both Mr. Asztalos and the driver. His behavior caused Mr. Asztalos to cancel the rest of the evaluation.

Mr. Aszatlos testified that plaintiff's behavior would bar him from acceptance in community programs. He further opined that the Dartmouth IEP was inadequate to enable plaintiff to generalize behavior learned in the classroom to unstructured settings, and that such generalization was a necessary element of any special education program for plaintiff.

Dr. John Paul, a staff psychiatrist at the Children's Hospital Developmental Evaluation Clinic ("DEC") and member of an evaluation team met plaintiff on December 2, 1983 and observed him during

his day at the clinic. He testified that during his session with him plaintiff exhibited a continuous preoccupation with sexual themes. On the way to Dr. Paul's office, plaintiff hugged a girl on crutches; only Dr. Paul's prompt action kept her from falling. Plaintiff also made advances toward persons in the waiting room and touched females in an inappropriate manner.

The DEC team concluded that plaintiff needed further diagnostic evaluation and residence in a 24-hour highly structured facility because of his inability to conform to norms of social behavior even for those at his cognitive level. In Dr. Paul's opinion, the Dartmouth IEP would not be sufficient to address plaintiff's need for consistent continuous training, given the frequency and inten-

sity of his unacceptable actions. Even accepting the hearing officer's finding that such incidents were isolated events, Dr. Paul believed that the nature and intensity of plaintiff's actions made residential placement necessary in order for him successfully to learn to control them.

Benjamin Handen, a clinical psychologist, evaluated plaintiff during his eight-week stay at Bradley Hospital beginning in January 1984. He twice met with plaintiff in forty-five minute evaluation sessions, and consulted with staff working with plaintiff during all of his time at Bradley. During the evaluation sessions plaintiff again engaged in sexual play with dolls and directed sexual behavior at Mr. Handen. He was able to stop this behavior when

given organized tasks to perform. In the evening hours, during less structured time, his deviant behavior was more frequent, with an average of six incidents per evening.

In Mr. Handen's opinion a 24-hour residential program is necessary to give plaintiff consistent and intensive training in appropriate behavior and an increased opportunity to be with his peers and learn to relate in an acceptable way to them. Even conduct such as touching and staring needed to be eliminated because such conduct together with more clearly unacceptable behavior was likely to prevent plaintiff's eventual placement in a community setting where he could be as independent as possible. Mr. Handen noted that given plaintiff's age (17 years) and the type and intensity of his

deviant conduct he is now also in danger of conflicts with the law. Mr. Handen believed that one to two years of a residential program would enable plaintiff to return to the community and function successfully. He opined that the Dartmouth IEP was not sufficient to train plaintiff in the continuous and consistent way necessary, since it left him too much unsupervised time.

Two neighbors of plaintiff also gave testimony concerning his behavior. Both recounted several incidents of plaintiff's socially inappropriate activities and his aberrant behavior with girls (one very young) and with dogs.

Gina Barbero, a 1983 graduate of Dartmouth High School, testified concerning her observations of plaintiff during time she spent as an aide in his

classroom during the 1982-83 school year. In that capacity she spent three forty-minute periods per week with plaintiff and his classmates during the later part of the school day, when activities were relatively unstructured. The regular class teacher, Mrs. Thomson, was almost always present in the room during that time, along with at least one other high school aide. Ms. Barbero on a few occasions saw plaintiff lie on the floor and try to look up girls' skirts. He also would move his chair very close to a female student's or aide's and touch her knee or arm or hug her. Ms. Barbero did not remember whether or not Mrs. Thomson was in the classroom when plaintiff engaged in this particular behavior. She stated that when Mrs. Thomson observed plaintiff engaged in any unacceptable

touching she disciplined him by having him sit removed from the group; Ms. Barbero saw plaintiff so disciplined about once a week. She stated that plaintiff behaved badly when a substitute teacher was in charge of the classroom. She believed plaintiff's unacceptable touching of females in the school outside his classroom was encouraged by other students.

Defendant offered the testimony of Mrs. Thomson, plaintiff's special needs teacher at Dartmouth during the 1983-84 school year, to supplement her testimony at the BSEA hearing relating to his performance in prior years. Plaintiff attended her class from September 1983 to January 1984 and returned to it from mid-May 1984 through the end of the school year. Mrs. Thomson testified that his

behavior was generally appropriate during the school day. He responded well to verbal reinforcement and to his peer tutors. She believed that he had gained in self control, requiring less frequent verbal reminders as to expected behavior. He was able to go to and from the gymnasium alone, and was mainstreamed for two gym classes each week and lunch in the cafeteria each day. She noted that plaintiff had re-adapted to the school program without difficulty when he returned in May after a four-month absence. A few weeks before the trial plaintiff had gone to a local restaurant for lunch with his class. He sat in a booth with a classmate and two high school aides and his behavior was completely appropriate throughout the meal. Mrs. Thomson stated that the class goes on such out-

ings to the community twice a week. She noted that plaintiff's IEP addresses social skills, sex education and behavior needs, which are part of plaintiff's special education needs. She felt that increasing the ability to generalize training is an important element of a program for plaintiff, and that at present he needs either instruction in appropriate behavior before encountering any new situation, such as attendance at a high school football game, or external structure (supervision) in that setting. She believed that the Dartmouth IEP provided for the kind of training and structure plaintiff needed. Because plaintiff responds readily to verbal reinforcement (he always ceased touching others when reminded) she felt that a complex behavior management program for him was not

necessary. She believed that plaintiff needed to work on resolving his problems in sexuality, but noted that sex education was part of the IEP, and that the counseling offered by Mr. Messmer was adequate.

III. The Standard the IEP Must Meet

The EAHCA provides a federal minimum standard or "basic floor" of beneficial education, which the First Circuit has defined as "demonstrable improvement in the education and personal skills identified as special needs--as a consequence of implementing the proposed IEP." Burlington II at 788. Where the district court determines that state law mandates a higher standard of educational service than the federal minimum, "the state standard will operate to determine what

an appropriate education requires for a particular child in a given state." Id. at 789.13/

The Massachusetts statutes relating to special education programs provide in relevant part:

> "The department [of Education] shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such definition

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13/ The state argues that Eleventh Amendment considerations embodied in the holding of Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) bar a federal court from ordering a state agency to comply with state standards. However, the First Circuit, writing after the Pennhurst decision, expressly held that the state standard was incorporated by reference in the federal EAHCA. Burlington II at 789. Thus the case here presents a question of compliance with federal law. The state's further Eleventh Amendment argument is unpersuasive.

that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs....

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassign-

ment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered." Mass. Gen. Laws ch. 71B, § 2.

"Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned." Mass. Gen. Laws ch. 71B, § 3.

The parties agree that the statutory language should be interpreted in light of the whole statute's clear preference

for keeping the child wherever possible in a regular education program or the least restrictive alternative placement, Commonwealth v. School Committee of Springfield, 382 Mass. 665, 669, 417 N.E.2d 408, 410 (1981); Isgur v. School Committee of Newton, 9 Mass. App. Ct. 290, 299, 400 N.E.2d 1292, 1298 (1980); and that private school placement is mandated only where the public schools cannot meet the child's special needs and the private school program is the least restrictive way to meet those needs. Commonwealth v. School Committee of Springfield, 382 Mass. 665, 669, 417 N.E.2d 408, 410 (1981); School Committee of Franklin v. Commissioner of Education, 17 Mass. App. Ct. 683, 697, 462 N.E.2d 338, 347 (1984). State law is thus congruent with the federal right to an edu-

cation in the least restrictive environment.

The parties disagree, however, as to the overall standard by which to judge whether a program is meeting the child's educational needs satisfactorily. Defendants, relying upon language in the cases cited above,[14/] argue that if a child is "benefiting" from his current program he cannot be transferred to a more restrictive program even though it might benefit him more. They point to the First Circuit's footnote statement in Burlington II that: "[a] state standard...which provides a substantive level of benefits exceeding the federal floor of opportunity may not be applied such

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14/ None deals directly with the issue of what constitutes the substantive standard under state law.

that the federal right to an education in the least restrictive environment will be diminished." Id. at 789 n. 19. Plaintiff counters with the next sentence in that footnote: "...[T]he least restrictive environment guarantee... cannot be applied to cure an otherwise inappropriate placement...." He notes that the court in the Isgur case cited by defendants recognized "maximum extent feasible" as the standard to be applied, Isgur at 299, and that the case was cited for that proposition in Burlington II, at 789. Moreover, the Supreme Judicial Court in a recent decision interpreted the first paragraph of Mass. Gen. Laws ch. 71B, § 2 (reproduced above) as requiring the Department of Education to administer special education programs "'to assure the maximum possible devel-

opment of a child with special needs.'" Stock v. Massachusetts Hospital School, 392 Mass. 205, 211, 467 N.E. 2d 448 (1984).

The weight of authority thus supports plaintiff's position that the Massachusetts standard requires more from an educational program than the "demonstrable improvement in the educational and personal skills identified as special needs" mandated by the federal Act, and therefore the state standard must be used in determining what an approximate education requires for plaintiff. Burlington II at 789. The issue to be determined therefore is whether Dartmouth's IEP addresses plaintiff's special educational needs so as to assure his maximum possible development in the least restrictive environment consistent with that goal.

IV. The 1982-83 IEP

The parties agree that social skills including sex education are part of this plaintiff's special education needs and progress in social skills and personal development is among the objectives set forth in the 1982-83 IEP for plaintiff. To meet these objectives Mrs. Thomson taught one weekly class in sex education during 1982-83 and another in social skills. She also inculcated social skills "as an ongoing thing;" the class participated in weekly trips into the community to promote generalization of learned social skills to settings outside the classroom.

After the BSEA hearing, Dartmouth amended the IEP to include individual therapy for plaintiff and family counseling for his parents and sister with

Ernest Messmer, a licensed clinical social worker and primary therapist at the Retarded Program of the Center for Human Services, Inc. After an initial evaluation of plaintiff, Mr. Messmer proposed that his treatment consist of a "behavioral specialist" providing 5-10 hours of training a week to plaintiff in order to try to decrease his unacceptable behavior, and a weekly "consultation and training" session for his parents.

V. Findings of Fact and Conclusions of Law

The hearing officer found that the IEP as amended met plaintiff's needs. The First Circuit has made it clear that judicial review of the decision below should not amount to a trial de novo. Colin K. by John K. v. Schmidt, 715 F.2d

1, 5 (1st Cir. 1983). Rather, the district court is to make "bounded, independent decisions--bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." Burlington II at 791. The question of the weight due the administrative findings of fact is left to the discretion of the trial court. Id. at 792. "The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole." Id.

Based on a preponderance of all the evidence before me, I make the following

findings. I accept the hearing officer's finding that plaintiff functions intellectually at the lower end of the moderately retarded range (with functional academic development at the kindergarten to first grade level) and that he exhibits socially unacceptable sexual and aggressive behavior. The hearing officer found that this included cruelty and sexual aggression directed at animals and inappropriate touching of females. Evidence at trial concerning plaintiff's behavior since the hearing supports these conclusions and establishes that such behavior has continued without interruption.

I also accept the hearing officer's finding that plaintiff has demonstrated the ability to exercise internal controls over his sexual and aggressive

drives within the school environment. The testimony at trial of Mr. Handen and Dr. Paul reinforced Mrs. Thomson's testimony that he was able to comply with acceptable behavioral standards in a structured setting.

The hearing officer further found that plaintiff was achieving effective educational progress, that his breaches of acceptable social standards outside the school situation were isolated, and that he had thus demonstrated a capacity to generalize his training in daily living. After careful consideration of the evidence upon which her finding was based and of the evidence presented at trial concerning plaintiff's behavior in unstructured situations, I reject these conclusions.

The preponderance of all evidence compels a finding that plaintiff cannot

adhere to acceptable standards of behavior when not under supervision or in a carefully controlled setting.15/ I am mindful that much of the more extreme sexual and other disruptive behavior occurred in evaluative settings unfamiliar to plaintiff; two of these were residential schools, and at FPS he understood he

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15/ The hearing officer listed the following four findings in support of her conclusion that plaintiff could generalize appropriate behavior most of the time at home and in the community: (1) plaintiff always calls his mother to report that he has arrived at a neighbor's house; (2) he completes chores at his father's butcher shop acceptably; (3) he behaves appropriately when he goes with his father to a restaurant for breakfast on Saturdays; and (4) the DMH respite workers who provided weekend trips for plaintiff about seven times during 1982-83 has not reported any aberrant behavior. These findings show that plaintiff can act appropriately in situations with a parent or surrogate present, but I do not see in them indications of any ability to behave acceptably when not so supervised.

understood he might be placed there. However, I credit Dr. Spencer's testimony that plaintiff's behavior was not attributable to the evaluative setting; that in her experience prospective students were generally more hesitant and well behaved than usual when coming to the school for evaluation. Moreover, plaintiff behaved inappropriately not only in every evaluative setting where plaintiff was seen, but in his own neighborhood around home and school. Plaintiff on "numerous" occasions attempted to engage in sexual play with dogs. He has repeatedly entered a neighbor's house without permission and refused to leave, and refused to leave automobiles. During his eight-week evaluative stay at Bradley Hospital, plaintiff engaged in inappropriate touching and other improprieties

several times each day when left alone. Even Mrs. Thomson described an incident when plaintiff disrupted a high school football game which he attended without supervision; she did not believe he could behave acceptably at such events unless supervised. The additional evidence received at trial made it clear that plaintiff's unacceptable actions do not occur merely as isolated instances but rather are a continuing and consistent problem.

All witnesses agreed and I find that the ability to generalize social and behavioral skills learned in the classroom is an appropriate part of a special educational program for mentally retarded persons such as plaintiff.[16/] David's

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16/ I further accept the hearing officer's finding that plaintiff's IEP should be directed towards maximizing

(footnote continued)

need for training to enable him to generalize behavioral control learned in school is therefore one that should be addressed by his IEP.

I accept the conclusion of plaintiff's experts that the Dartmouth IEP as amended was not adequate to meet plaintiff's need to learn to generalize social skills because it did not provide for consistent response to his behavior and training in control of them throughout his waking hours. A residential program is necessary in order to teach plaintiff

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(footnote continued)

his potential for eventual placement in a community-based program or private employment. It concurs with plaintiffs' experts' opinion that the goal of any special education program is to assist the student to maximize the ability to be independent as an adult. In light of this unanimity, defendants' contention that plaintiff's social behavior problems are unrelated to his educational needs must be dismissed.

to behave appropriately in situations lacking external controls. I find that without such a program plaintiff's behavior is likely to continue and agree with the hearing officer's finding that such behavior would prevent him from being accepted in a community-based residence or workshop for which he is otherwise well suited.

The state standard mandates that an IEP assure plaintiff's maximum possible development.[17/] I find persuasive the unanimous opinion of plaintiff's experts that plaintiff requires a residential training program in order to achieve the maximum progress in development in his

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17/ In light of Burlington II, the cases cited by defendants for the proposition that the federal minimum standard requires less are inapposite.

ability to function as independently as possible and that a residential setting is the least restrictive environment in which plaintiff's educational needs could currently be met. Therefore, I conclude that plaintiff has met the burden of proving that the Dartmouth IEP for 1982-83 (as amended) is inadequate; and I find that placement in a residential school providing a program such as that offered by FPS is the educational placement appropriate for plaintiff.[18/]

No later than September 28, 1984 counsel shall file an agreed form of

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18/ Defendants have not met their burden of persuading the court of circumstances rendering the determination as to 1982-83 inappropriate for subsequent years. Burlington II at 795. The 1983-84 IEP developed by defendants was never the subject of any administrative hearing and is not before me.

judgment in accordance herewith, or, if they cannot agree, each shall file a proposed judgment.19/

19/ In view of this disposition, I do not address plaintiff's procedural claims, raised in Counts II, III and VII of the complaint. Counts IV and V must be dismissed in light of Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), which also makes clear that attorney's fees are not available to plaintiff in this action.

MASSACHUSETTS
DEPARTMENT OF EDUCATION

DIVISION OF SPECIAL EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: David D. BSEA # 83-0158

DECISION

This decision is rendered pursuant to M.G.L. Chapters 71B and 30A and P.L. 94-142, and the Regulations promulgated thereunder.

A hearing in the above-captioned case was held by the Bureau of Special Education Appeals (BSEA) on 3/15/83 and 4/13/83[20/] at the Southeast Regional Education Center, Lakeville, on appeal by Mr. and Mrs. J.D. of the Individual Educational Plan (IEP) for 1982-83 proposed by the Dartmouth Public Schools

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20/ Closing arguments from Dartmouth and the parents (Exs. 18 and 19) were received on 5/4/83.

for their minor son, David. Prior to the instant hearing, BSEA conducted a pre-hearing conference on 1/11/83, and the parties assented to specific terms that were incorporated in an order issued by BSEA on 1/13/83 (Ex. 15).

Parties present at all, or part of, the hearing were:

Mrs. E.D.	- Mother
Norah Wylie	- Attorney for Child/Parent
Lenore Piper	- Advocate
James Bowman	- Psychologist, Developmental Evaluation Clinic, Children's Hospital Medical Center
Dr. Mai-Lan Rogoff	- Psychiatrist, DEC
Felicia Wilzenski	- Special Education Consultant, DEC
Richard Asztalos	- Behavioral Specialist, Learning Center for the Multiply Handicapped
Jacqueline Calhoun	- Former Teacher
James Cronin	- Attorney for Dartmouth Public Schools

John Wilson	- Director of Pupil Personnel
Emily Thomson	- Special Needs Teacher
Dr. John McCarthy	- TEAM Coordinator
Dennis Lyonnais	- Adaptive Physical Education Teacher
Phyllis Ryack	- Hearing Officer

PRELIMINARY STATEMENT

David is a 15 year old adolescent with Down's Syndrome whose functions cognitively within the lower end of the moderately retarded range. His academic development is at about the kindergarten to first grade level. Although David has demonstrated an ability to exercise internal controls over his sexual and aggressive drives within the school placement, his preoccupation with sexually provocative thoughts and behaviors in unstructured settings outside of school have raised concerns about David's

physical and emotional safety, and the welfare of others.

David spent his early schooling in a private day program at his parents' expense, and has attended the Dartmouth Public Schools since 9/76.

POSITION OF THE PARTIES

Mrs. D. - Although David's mother raised no specific objections to the educational component in the 502.4 developmental disabilities program at Dartmouth High School, her request for a 502.6 private residential placement rested on the following grounds: 1. During the past two years, his inappropriate sexual behavior has increased outside of school involving overt masturbation, termination at a private residential camp in midsummer 1982, aggressive behavior towards

a female dog, and sexually provocative acts directed at female professionals during his independent evaluation at Children's Hospital Medical Center (CHMC) in 1 and 2/83; 2. Since Dartmouth professionals believe that David's functional potential extends beyond the lower functioning range accomodated at a New Bedford sheltered workshop, he requires a 24-hour tightly coordinated behavior modification program to render him acceptable for private employment and/or more challenging community resources when is no longer eligible for special education services under state and federal laws; 3. Considering that David requires constant and consistent supervision around the clock to assist him in exerting internal controls over sexual

and aggressive impulses, the extent of this supervision is greater than could be provided by family members; 4. The residential Learning Center Program provides more comprehensive community experiences geared to promote David's ability to generalize learned functional life-skills to the degree that his potential will allow.

Dartmouth supported the adequacy and appropriateness of the 502.4 program to meet David's multiple special needs on the grounds that: 1. During more than five years that Emily Thomson has been his principal teacher, David has never evidenced any inappropriate sexual behavior other than touching her, and occasionally other students, affectionately; David immediately ceased these displays

of affection when teacher directed; 2. As a proficient and enthusiastic participant in Special Olympics activities during the past three years that included overnight trips to Boston University (for two years), David has never demonstrated unacceptable sexual behavior under firm limit-setting and clearly defined expectations; 3. Although David has occasionally wandered away from his group at Special Olympics when he became interested in other activities, his behavior has not warranted restricting him from scheduled activities; 4. Since David's class includes five students whose functional levels range from two to seven years old, 23 high school students are assigned to the class throughout the week in the absence of a full-time aide. David has

established comfortable social relationships with the students, and has never displayed sexually aggressive behavior; and 5. In response to Mrs. D.'s concerns about David's sexual and aggressive drives outside the school setting, Dartmouth proposed for the first time at the hearing on 4/13/83 the following amendment to his 1982-83 IEP: Individual and family counseling with Ernest Mesmer, primary therapist at the Retarded Program of the Center for Human Behavior, with the amount and duration of the therapy components to be determined by Mr. Mesmer after initial diagnostic evaluations.

INDEPENDENT EVALUATIONS

In compliance with the BSEA order of 1/13/83 (Ex. 15), David was reevaluated

at the Developmental Evaluation Clinic (DEC) of CHMC (prior evaluation took place in 6/81 Ex. 1). Evaluative components included: Psychological (Ex. 11a), Psychiatric (Ex. 11b), and Educational (Ex. 11c).

James Bowman, a doctoral candidate in psychology and an associate psychologist at DEC for three years, qualified his professional experience teacher of emotionally disturbed children in Boston Public Schools for three years, former private school principal for emotionally disturbed youngsters, and former consultant to the Chelsea Public Schools on adolescent children. Based on his evaluations of David on 1/19/83 for 1 1/2 hours, and on 2/11/83 for more than 2 hours, combined with his observations of David alone in the playroom, and in

the lobby of DEC interacting with the public, Mr. Bowman made the following findings: 1. In the absence of rigid parameters, David was conflicted by issues of sex and aggression, and demonstrated only limited abilities to exercise internal restraints placed upon him by these drives; 2. David intermittently engaged in masturbating behaviors throughout the testing session; 3. Based on the Stanford Binet Intelligence Scale, David performed at a 5 year 3 month age level with diminished performance on tasks requiring processing of more complex information reflecting attentional deficits and impulsivity; 4. In the absence of structured tasks, David's conversation focused on oral and anal intercourse suggesting some experimental basis

with males and animals, and causing him a sense of shame; 5. His sexual responses to projective testing were beyond the normal limit for any 15 year old boy; 6. Walking down the hall with Mr. Bowman, David made inappropriate and apparently sexual exploratory advances towards two female social workers he pinched one on the buttocks, and after kissing the buttocks of the second woman, he grabbed at her breast; and 7. In the DEC lobby, David stroked a small child in a sexually provocative manner until Mrs. D. ordered him to cease.

Mr. Bowman recommended 24-hour professional supervision of David's behavior to assist him in internalizing his sexual and aggressive drives. "I think that it is beyond the capability of any family to

provide the level of monitoring and structure that David needs because of the parent-child relationship." Although Mr. Bowman testified that psychotherapy would be insufficient in the absence of a 24-hour tightly structured program to substantively modify David's abundant behaviorial problems, he stated that "there is no guarantee that a 502.6 program would significantly alter these profound behaviorial deficits".

Dr. Mai-Lan Rogoff, Instructor in Psychiatry at Harvard Medical School and Staff Psychiatrist at DEC, spent about 45-60 minutes evaluating David and observing him in the lobby on 2/11/83. Based on her clinical interview, Dr. Rogoff found: 1. David needed constant supervision and repetition in order to enable

him to exert inner controls; 2. Although David did not dwell on his sexual fantasies (Dr. Rogoff opined that since she is a woman, David sensed that discussion of his sexual preoccupation with her would be inappropriate), his play with toy dinosaurs was suggestive of sexual themes; 3. Since David responds well to external limit-setting, and has a desire to please, this probably accounts for David's controlled behavior in school as opposed to his aberrant behavior in unstructured settings; 4. He did not appear to be psychotic, pathologically depressed, or out of touch with reality; and 5. Although David easily accepted limits, he seemed to require consistent and repeated external limits in order to remain within socially accepted norms of behavior.

In recommending a residential placement, Dr. Rogoff testified that the degree of intensive supervision that David requires to modify his severe behaviorial problems "is more than a family can provide". "Psychotherapy in the absence of environmental controls is not sufficient to make the kind of impact that David needs. He must know that limit-setting will be consistent and that his options are limited."

As the DEC Assistant in Special Education, Felicia Wilzenski evaluated David for about 45 minutes on 2/11/83. Based on standardized testing protocols, Ms. Wilzenski proferred the following diagnostic findings: 1. Academic achievement was at a kindergarten level, 2. He could not solve simple addition and subtraction tasks unless counting

strategies were provided, 3. David has only a gross awareness of time, money, and measurement concepts, 4. He has a limited sight vocabulary which includes colors, numbers, and several common environmental signs, 5. He needed constant reinforcement after completing 30-second segments. Ms. Wilzenski recommended that goals in David's IEP should focus on communication, socialization, activities of daily living, functional academics, and vocational activities.

DISCUSSION OF DARTMOUTH'S 502.4 PROGRAM

As David's teacher without interruption since 1/78, Emily Thomson testified that the class has virtually remained intact during the intervening years with only a few changes in the class composition. The class currently includes one

20 year old boy who is functioning at the 2-3 year old level; two 17 year old girls functioning at the 2-3 and 4-5 year old levels; David at the 5-7 year old level; and a 15 year old girl at lower academic, but higher social levels than David. Although no full-time aide is assigned to the class, Ms. Thomson testified that 23 high school students are staggered during the week with a minimum of two aides to a maximum of four aides present during every period, and a regular ratio of 2:4 during field trips into the community (one child does not participate). Although these high school students provide small group tutoring under Ms. Thomson's direct supervision, she stated that their most important function is to establish a meaningful

social rapport with the class.

David's 1982-83 IEP (Ex. 10) provides the following components: Functional academics (he can tell time to the hour, half-hour and 5 minute intervals; he can print his name and address and write a simple sentence with teacher intervention; he is beginning to understand monetary values; his reading is at the kindergarten to first grade level); Language and communication (receptive language is at the 6-7 year old level, and expressive language at a slightly lower level); Social skills provided on an individualized basis (Ms. Thomson stated that David has never displayed inappropriate sexual behavior to teachers, classmates, or high school aides other than occasional affectionate touching); Sex Education - provided for the first time during 1982-83; Pre-vocational and ADL (activities of

daily living) activities - although the pre-vocational tasks focus on assembly, collating, sorting, filling containers, boxing, packaging, and sequential activities, Ms. Thomson indicated that David showed a potential to exceed beyond a low functioning sheltered workshop program, and to possibly private employment. Since the class uses a fully-equipped home economics classroom three times weekly, instruction is geared towards following simple recipes, food storage, use of a stove, and appropriate kitchen skills. Ms. Thomson pointed out that the class participates in weekly community trips to a discount store, supermarket, library to promote generalization of learned social and functional skills to settings outside the classroom. David is mainstreamed for music and art. Ms. Thomson testified that the music teacher

reported that David is well-motivated in using simple musical instruments, and after the art teacher set firm limits on David's use of equipment for his own safety, his behavior is acceptable, and he has demonstrated progress. David also receives an hour of speech therapy weekly.

In responding to queries about apparent regression by David in certain skill areas noted in the progress reports for 1981-82 (Ex. 5), Ms. Thomson stated that in each instance David's behavior may have prompted an indication that he lost some gains, but that his over-all gains amounted to effective educational progress. Concerning the progress report of 3/82 (Ex. 14), Ms. Thomson testified that: 1. David is still learning how to deal with new situations, and has a continuing need to generalize learned

skills, 2. He still needs prompting to stop occasional teasing, and 3. David needs additional reinforcement to follow directions from school professionals other than his teachers.

Dennis Lyonnais has been David's adaptive physical education teacher since 9/79 in a regularly scheduled program. Combining classes in the school gym with one afternoon weekly of sports activities throughout the school year (swimming, bowling, and swimming), Mr. Lyonnais provides weekly services totalling two hours 15 minutes. He underscored that David derives substantial personal reward from his athletic accomplishments (mainstreamed archery, basketball, floor hockey, weight-training, and gymnastics), and he has demonstrated significant gains in gross motor and strength development.

Mr. Lyonnais testified that two weeks before the instant hearing, David ran a mile, and was very pleased with his performance.

Although David has participated in track and field, swimming, and bowling events in the Special Olympics for the past three years, and is integrated for other activities cited supra, Mr. Lyonnais stated that David has never displayed any inappropriate sexual behavior. Rather, when David knows that his teacher is especially pleased with his performance, Mr. Lyonnais testified that David may occasionally want to hug him. During overnight trips to Boston University for the Special Olympics for the past two years, Mr. Lyonnais explained that he maintains a structured situation

by sleeping in the same dormitory room with David and another student.

DISCUSSION OF THE 502.6 PROGRAM AT THE LEARNING CENTER FOR THE MULTIPLY HANDICAPPED.

As a licensed social worker responsible for designing behavior management programs at the Learning Center, Richard Asztalos was formerly employed at the Fernald School and at the Amigo School, Hingham (a facility for autistic and severely handicapped students) as a Program Director and Residence House Manager, and currently holds an associate professorship in special education at Bridgewater State College. During David's intake evaluation at the Learning Center on 1/6/83, Mr. Asztalos coordinated the

following evaluative components: Vocational, speech/language, academic, socialization, physical fitness, and ADL within a residence facility.

Mr. Asztalos' testimony focused initially on David's behavior during the evaluation process. For the first 45 minutes, David was polite, cooperative, compliant with teachers' requests, and responsive to praise and edible reinforcements. Following a marked increase in distractability, he displayed the following behaviors: 1. Hid in a closet for a few minutes, 2. Plopped on the floor several times, 3. Hugged the speech therapist 3 or 4 times, and touched her sweater 8 or 9 times, 4. After entering the janitor's closet to get a broom, David refused to stop sweeping, 5. At the residence, David refused to set the table

or make a bed (Mr. Asztalos admitted that he lost control over David's behavior), 6. When David and Mr. Asztalos were in the car alone, David pulled Mr. Asztalos' nose, and his hat over his eyes triggering a dangerous driving situation, and 7. David refused to leave the school building, and complied only upon the intervention of his mother. After observing these behaviors, Mr. Asztalos opined that David's "rate and intensity of touching, excessive hugging, and non-compliant behavior was higher than normally seen by similarly disabled youngsters".

The student body at the Learning Center includes 33 residential students and 13 day students all evidencing mental impairment ranging from moderate to bor-

derline, and with emotional problems. The day school faculty has 25 teachers (four Head Teachers are certified in special education, and all teachers are degreed), and the residential staff includes 40 full and part-time workers. Managers of the day components and individual residences meet weekly to discuss updated progress reports to assure consistency in implementing behavioral management systems. All residential personnel must participate in a 40-hour behavioral analysis workshop. Although Mr. Asztalos provides crisis intervention, medical and psychiatric consultations are provided by the Kennedy Memorial Hospital on an as-needed basis. The Learning Center program does not include a formal family training component to as-

sist families in managing their children within the home setting. The program does not include a physical education component.

The school day extends from 9 A.M. to 4 P.M., and includes the following segments: Vocational activities considering David's behavioral problems, Mr. Asztalos testified that David would be placed in the lowest level with about 10 students in order to access a 3-2 student-teacher ratio. Tasks include sub-contract paid work and teacher-prepared jobs that focus on component skill development. When students evidence increased vocational proficiency, they are advanced to high levels that culminate in on-job placements under supervision. David would spend about 60 per cent of the day in the vocational training unit.

Academics Taught by a certified special needs teacher in small groups with emphasis on functional reading (safety and precaution words), math (counting, understanding the use of currency, making change, banking skills), and community awareness (weekly trips to restaurants, movies, and recreational facilities).

David would be assigned to the Carriage House residence that currently accomodates six students aged 16 to 22. The staffing patterns and ratios are as follows:

Monday to Friday:

7 A.M. to 9 A.M. - 3:6
(Students are at school from 9 A.M. to 4 P.M.)
4 P.M. to 5 P.M. - 2:6
5 P.M. to 9 P.M. - 3:6
9 P.M. to 11 P.M. - 2:6
11 P.M. to 7 A.M.- 1:6

Saturday and Sunday:

> Ratio is 2:4 or 3:6 during the awake hours depending upon the number of students remaining during the weekends.

N.B. This information was received on 5/4/83 after the hearing closed, and therefore not subject to direct or cross examination. (Ex. 17).

All students at the residence are assigned specific tasks: simple food preparation, kitchen skills, cleaning own room and common areas, setting the table, etc. Structured activities during the weekends include: arts and crafts, jogging, trips into the community to reinforce community awareness goals and objectives, supervised play in the gym, and roller-skating.

Although the Learning Center accepted David as a residential student on 3/9/83 (Ex. 13), Mr. Asztalos testified that he was not certain that the program can provide the degree of intensity and structure that David needs. "We know that he'll burn out teachers who are his primary care-takers."

FINDINGS AND CONCLUSIONS

David D. is a child with special needs as defined by M.G.L. c. 71B and P.L. 94-142. This finding is undisputed by the parties, and confirmed by documentary and testimonial evidence. The essential question to be answered is whether David's special educational and behavioral/emotional special needs can be met during school year 1982-83 in a

502.4 program in the Dartmouth Public Schools, or whether his sexually provocative and inappropriate behavior outside the school setting requires his placement in a 502.6 private residential program at the Learning Center for the Multiply Handicapped in order to achieve effective educational progress.

The nature of David's profound and diverse handicaps were detailed comprehensively in the record (e.g. Exhibits 1-18, and about 10 hours of testimony), and were essentially undisputed by the parties. David is a 15 year old adolescent with Down's Syndrome who functions intellectually at the lower end of the moderately retarded range, and who exhibits socially unacceptable behaviors. Specific examples of David's aberrant behavior were cited by Mrs. D.: 1. In

late 12/82 or early 1/83, Mrs. D. observed David diagonally across the street on a neighbor's front lawn fondling the genital area of a female dog; 2. In either 2/83 or 3/83, David exposed himself to his mother in the car; 3. David was terminated at mid-session 1982 from a private residential summer camp for behaviorally involved children because of inappropriate sexual behavior; and 4. David exhibited cruel and abusive treatment towards the dog of a Department of Mental Health (DMH) respite worker resulting in the payment of veterinary expenses by Mr. and Mrs. D. Although his ADL skills are fairly well developed (dressing, personal hygiene, feeding, etc.), David's functional academic development is at about the kindergarten to

first grade level.

ISSUE #1

In weighing the adequacy and appropriateness of David's current 502.4 program to address his educational and behavioral/emotional special needs, I carefully considered the following factors: 1. Whether David's sexual and aggressive drives impede his ability to learn, 2. Whether David's behavior outside the school setting is consistently provocative and inappropriate, and 3. Whether the provision of individual therapy and family counseling could impact positively on David's behavior at home and in the community.

The record in this case is particularly compelling in setting forth strikingly disparate discriptions of David within highly structured school and athletic settings where firm limit-setting is in place, and where expectations are clearly defined, as opposed to situations at home, in the community, site of independent evaluations, and intake evaluation at a private residential school where David found himself in unfamiliar environments and/or limit setting was less rigid. As Dartmouth professionals who have been direct service providers to David for more than five years, Emily Thomson (David's classroom teacher) and Dennis Lyonnais (his adaptive physical education teacher and Special Olympics coordinator) concurred in their testi-

monies that David has never evidenced sexually provocative and aggressive behavior. They agreed that he may occasionally want to hug his teacher in an affectionate manner, especially when he realizes that his performance has pleased his teachers. Beyond these occasional displays of enthusiasm and affection, Ms. Thomson and Mr. Lyonnais testified that they have never observed any aberant behavioral characteristics. The record shows that the only dissenting voice concerning David's behavior in school came from Jacqueline Calhoun, his ADL and pre-vocational teacher during 1981-82 (retired in 6/82). Ms. Calhoun testified that: 1. David attempted to pull down the underpants of a girl student, and 2. David unzipped the pants of

a boy student; David stopped these actions immediately when directed. Since Ms. Calhoun mentioned only these two instances of sexually provocative behavior, I must infer that no others occurred. I find that Ms. Calhoun apparently did not consider these instances significant since Ms. Thomson testified that Ms. Calhoun did not report them to her. Ms. Calhoun's opinion that "David needs a strong behavior modification program that cannot be successful within a five-hour schoolday" was based on David's attention-getting behavior that continued until Ms. Calhoun intervened. In the absence of corroboration by Ms. Thomson and Mr. Lyonnais who have been directly involved in David's eductional program for several years, I reject Ms. Calhoun's

assertion as unsubstantiated by the record. Further, after reviewing progress reports submitted by Mr. Lyonnais on 1/26/83, and by Ms. Thomson on 2/18/83 (Ex. 14), I find that the goals and objectives contained in David's 1982-83 IEP (Ex. 10) are being largely addressed and met. I am persuaded by the evidence that David has demonstrated his ability to exercise internal controls over his sexual and aggressive drives within the school setting, and is achieving effective educational progress.

The record shows that Mrs. D.'s argument that David required a residential placement was based essentially on descriptions of David's behavior in isolated situations that were proferred by Mrs. D., Dr. Mai-Lan Rogoff and James

Bowman (evaluating psychiatrist and psychologist respectively at DEC), and Richard Asztalos (behavioral specialist at the Learning Center). While Dr. Rogoff and Mr. Bowman concurred that the "Dartmouth program seems to be working well for David", they opined that his sexual preoccupation and deviant behavior required a 24-hour highly-structured behavior management system delivered by trained professionals. I find support in Mrs. D.'s testimony that: 1. The sexually provocative and non-compliant behavior exhibited by David at DEC and the Learning Center was largely atypical, and 2. David has demonstrated his ability to generalize appropriate behavior most of the time at home, and in the community. My support for this finding rests

with the following examples of David's responsiveness to external controls that were cited by Mrs. D.: 1. David always calls his mother to report that he has arrived at a neighbor's house two blocks away, 2. David completes assigned chores in his father's butcher shop in an acceptable manner, 3. David behaves appropriately when he accompanies his father to a restaurant for breakfast on Saturdays, and 4. The DMH respite worker who has provided weekend trips for David about seven times during 1982-83 has not eported any abberant behavior by David. Considering that David's cognitive level is relatively high (testimony of Dr. Rogoff), he has shown an ability to comply with limited options, and limit-setting beyond the school situation. Based

on this persuasive evidence, I conclude that despite isolated breaches of acceptable social behavior, David has demonstrated a capacity to generalize his ADL skills at home and in the community.

The matter of David's confusion about his sexuality remains a troubling concern, and was addressed by Dartmouth at the hearing. Dr. John McCarthy, TEAM coordinator, proposed the following amendment to David's IEP: Individual therapy for David and family counseling for his parents and sister with Ernest Mesmer, licensed clinical social worker and primary therapist at the Retarded Program of the Center for Human Behavior, with the amount and duration of the components to be determined by Mr. Mesmer after initial diagnostic evaluations.

Dr. McCarthy stated that Mr. Mesmer would: 1. Assess David's understanding of his sexuality, and provide relevant sex educational since Mrs. D. testified that his parents have never provided this information, and 2. Assist his family in discussing sexual matters comfortably with David.

Since I am mindful that David's eligiility for special education services extends only to the age of 22 under state and federal laws, I find that his educational program should be directed towards maximizing his potential for eventual placement in a community-based program or private employment. Since the record demonstrates that his sexual preoccupation could pose a real deterrant to his acceptance in work-related situations (testimony of Mr. Bowman, Ms. Calhoun,

Mr. Asztalos), I find that the therapy components constitute a necessary supportive service under C. 766 Regulation 503.1(h)(iv): "Individual counseling provided by a school adjustment counselor, social worker, psychologist or psychiatrist to a child in need of special education or the parents of such child. Services to the parents, as provided for in this paragraph, shall be directly related to the achievement of short and long term objectives of the child's IEP." Consistent with this regulation, I find that David's IEP contains the following Goal 28, Objective 05 "Given the opportunity, the student will resolve problems that relate to sexuality".

Having rendered this finding, I must underscore that David's special educational need for sex education is sup-

ported wholly by the evidence considered in the instant case, and should not be construed as indicating that sex education is a necessary supportive service for the general class of handicapped children.

Based on a preponderance of the evidence cited supra, I find that the 1982-83 IEP as amended is adequate and appropriate to meet David D.'s special educational needs in the least restrictive prototype mandated by C. 71B and P.L. 94-142.

ISSUE #2

Having made these findings, there is no need to discuss the merits of the 502.6 private residential placement at the Learning Center for the Multiply Handicapped.

CONSIDERATION OF DECISION:

Consideration of the case may be granted upon the showing of any serious error of law; construction of the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals; such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEAL:

Both parties have rights of appeal under P.L. 94-142 (20 U.S.C. 1401), Chapter 71B and 30A of the Massachusetts General Laws. The parents may choose to appeal the decision of the Bureau by so indicating on the form accompanying this decision, thereby constituting an appeal to the State Advisory Commission. The parent appeal to the State Advisory Commission is optional. The public school and the parent, when the parent waives the right to appeal to the State Advisory Commission, or following the decision of the SAC, may file a petition for review in the Superior Court of competent jurisdiction or in the district court of the United States. Appeals to Superior Court must be filed within thirty (30) days after receipt of the final decision of the Bureau. Where the parents of the

child accept the decision of the Bureau of Special Education Appeals or the State Advisory Commission the decision is final and must be implemented immediately. Where the parents of the child reject the decision of the Bureau of Special Education Appeals or the State Advisory Commission the filing of a petition shall operate as a stay of enforcement of said decision. During the pendency of any judicial proceedings, unless the parents agree otherwise, the child shall remain in the educational placement implemented at the time the initial appeal was taken.

RECORD OF THE HEARING:

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request and upon receipt of payment for the recording tapes. Massachusetts Gen-

eral Laws c. 30A sections 11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A §11(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.
>
> 30A §14(4) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of prepar-

> ing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education Appeals for certification within 35 days of service of a copy of a petition for review upon the agency.

Any party unduly burdened by the cost of preparation of a written transcript of

the sound recordings may petition the Bureau of Special Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child

(i.e. use John or Jane Doe) and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1937

DAVID D., ETC.,
Plaintiff, appellee,

v.

DARTMOUTH SCHOOL COMMITTEE,
Defendant, appellee.

MASSACHUSETTS DEPARTMENT
OF EDUCATION,
Defendant, appellant.

No. 84-1938

DAVID D., ETC.,
Plaintiff, appellee

v.

DARTMOUTH SCHOOL COMMITTEE,
Defendant, appellant.

No. 84-1939

DAVID D., ETC.,
Plaintiff, appellant,

v.

DARTMOUTH SCHOOL COMMITTEE, ET AL.,
Defendants, appellees.

JUDGMENT

Entered: October 15, 1985

These causes came on to be heard on appeals from the United State District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court,

Clerk.

[cc: Messrs. Howard, Murdock, Cronin and Crabtree]

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Defendants, Appellees.

BEFORE

CAMPBELL, Chief Judge,
COFFIN, BOWNES, RUBIN,21/ BREYER,
and TORRUELLA, Circuit Judges.

ORDER OF COURT

Entered: December 3, 1985

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

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21/ Of the Fifth Circuit, sitting by designation.

It is ordered that the suggested for rehearing en banc be hereby denied.

By the Court:

Clerk.

[cc: Messrs. Howard, Murdock, Cronin and Crabtree]

20 U.S.C. § 1401(16)

The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. § 1401(17)

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only)

as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1415(e)(2)

Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of compe-

tent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

MASS. GEN. LAWS C. 71B, § 2

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such

however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction

with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or

other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments, or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special

education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said chld is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

MASS. GEN. LAWS C. 71B, § 3

In accordance with the regulations, guidelines and directives of the depart-

ment issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in

public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person hav-

ing custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local

school department, an assessment by a classroom teacher who has dealth with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shal maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those person assessing said child shall present a method of monitoring the bene-

of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires a medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made accord-

ing to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluaton, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians or persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody

is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than regular education program, the matter shall be

referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or person with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child

placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluted as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.